

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DIRECTV, INC., a California
corporation,

Plaintiff,

v.

ROBERT WAIDTLOW, et al.,

Defendants.

No. CIV.S-03-2446 DFL DAD

FINDINGS AND RECOMMENDATIONS

This matter came before the court on September 16, 2005,
for hearing on plaintiff's motion for default judgment against
defendant Judy Kim and defendant Kim's cross-motion to set aside the
entry of default against her. Kelli N. Osaki appeared on behalf of
plaintiff. Defendant Kim, proceeding pro se, appeared on her own
behalf. Having considered all written materials submitted with
respect to the motions, and after hearing oral argument, for the
reasons set forth below the undersigned recommends that defendant's
motion to set aside entry of default be granted and plaintiff's
motion for default judgment be denied as moot.

PROCEDURAL BACKGROUND

On November 25, 2003, plaintiff DirecTV, Inc. initiated this action by filing a complaint for damages and injunctive relief pursuant to various federal statutes prohibiting the interception of satellite communications. The complaint names four individual defendants and alleges federal causes of action under 47 U.S.C. §§ 605(a) and 605(e)(4) (unauthorized publication or use of communications); 18 U.S.C. § 2511(1)(a) (unauthorized interception and disclosure of wire, oral, or electronic communications); and 18 U.S.C. § 2512(1)(b) (unauthorized manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices). The complaint also alleges a state law claim for conversion. According to the complaint, defendant Kim's liability to plaintiff stems from her alleged purchase and use of "a Pirate Access Device, consisting of a printed circuit board device called an 'Atomic Multi-Purpose,' from [an entity known as] DSS Pro."¹ (Compl. ¶ 11(a).)

¹ Plaintiff is a company in the business of distributing television broadcasts throughout the United States. According to the complaint, plaintiff has developed a satellite system capable of transmitting digitized video and audio signals to homes and businesses nationwide to be used for entertainment purposes. In addition to other hardware, such as a satellite dish and receiver, each DirecTV customer is required to have a removable access card that manages the receipt of satellite signals and the opening and closing of television channels offered by DirecTV. DirecTV scrambles its signals using encryption technology to prevent their unauthorized reception. According to the complaint, each named defendant purchased and used an illegally programmed access card and/or a device designed to permit viewing of DirecTV's programming without authorization by or payment to DirecTV.

1 Despite being served with process, defendant Kim failed to
2 appear in this action. On July 27, 2004, the Clerk of the Court
3 entered default against defendant Kim pursuant to plaintiff's
4 request. On July 8, 2005, plaintiff filed its motion for default
5 judgment. Defendant Kim did not respond to plaintiff's motion in
6 writing but appeared at the August 19, 2005, hearing on the motion.
7 Defendant Kim requested additional time to oppose the motion as well
8 as to move to set aside the entry of default against her. The court
9 granted defendant Kim's requests and set both motions for further
10 hearing on September 16, 2005.

11 LEGAL STANDARD

12 Federal Rule of Civil Procedure 55(c) governs the setting
13 aside of an entry of default and states, in relevant part: "For good
14 cause shown the court may set aside an entry of default" The
15 Ninth Circuit has indicated that a district court's discretion is
16 "especially broad where ... it is entry of default that is being set
17 aside, rather than a default judgment." Mendoza v. Wight Vineyard
18 Mgmt., 783 F.2d 941, 945 (9th Cir. 1986) (citation omitted). See also
19 Brady v. United States, 211 F.3d 499, 504 (9th Cir. 2000). "A
20 decision on a motion to set aside a default is not an abuse of
21 discretion unless the court is 'clearly wrong' in its determination
22 of good cause." Mendoza, 783 F.2d at 945 (citation omitted). "Where
23 timely relief is sought from a default ... and the movant has a
24 meritorious defense, doubt, if any, should be resolved in favor of
25 the motion to set aside the default so that cases may be decided on
26 their merits." Id. at 945-46 (internal quotations, citations and

brackets omitted). See also O'Connor v. State of Nevada, 27 F.3d 357, 364 (9th Cir. 1994).

ANALYSIS

As discussed on the record at the hearing on the parties' motions, while defendant Kim's motion to set aside the default against her may not be prompt, the undersigned finds that it is timely. In this regard, the court notes that defendant Kim is proceeding pro se in this matter. Additional confusion, from defendant's perspective, has resulted from defendant Kim communicating and negotiating with counsel for plaintiff regarding the possible settlement of this matter.² It also is noteworthy that plaintiff has not demonstrated an intention to litigate this case in a particularly speedy fashion, having waited nearly one year after the Clerk's entry of default to move for entry of default judgment. For these reasons, the undersigned finds that defendant has sought timely relief from the default entered against her.

Defendant Kim has also asserted a potentially meritorious defense to plaintiff's action. Specifically, defendant Kim asserts that she neither purchased nor used any pirate access device. She has submitted a sworn affidavit in this regard as has her son. Plaintiff has yet to offer any evidence to the contrary. Moreover, as observed by the court at the hearing, the case law developing in this area has at least called into question the validity of two of the four federal claims alleged in plaintiff's complaint.

² The court recognizes that the parties dispute the content of those communications.

1 Specifically, there is considerable authority supporting the
2 proposition that no private right of action exists pursuant to 18
3 U.S.C. § 2512(1)(b). See DirecTV, Inc. v. Treworgy, 373 F.3d 1124,
4 1129 (11th Cir. 2004) ("Congress did not create a private right of
5 action against persons in possession of access devices in violation
6 of section 2512(1)(b)."); DirecTV, Inc. v. Huynh, 318 F. Supp. 2d
7 1122, 1129 (M.D. Ala. 2004); DirecTV, Inc. v. Amato, 269 F. Supp. 2d
8 688 (E.D. Va. 2003). One district court has found that there is no
9 private right of action under 18 U.S.C. § 2511(1)(a) as well. See
10 DirecTV v. Decroce, 332 F. Supp. 2d 715, 720 (D. N.J. 2004) ("Congress
11 did not intend to create a private right of action for a violation of
12 Section 2511(1)(a) based on the unauthorized interception of
13 satellite television programming.") For these reasons, the court
14 finds that defendant Kim has asserted a meritorious defense at this
15 stage of the proceedings.

16 Finally, defendant having requested permission to file an
17 answer and proceed with her defense of this action, the court does
18 not recommend conditioning the setting aside of the default in any
19 other respects. More specifically, the court recommends that the
20 district court deny plaintiff's request that the setting aside of
21 default be conditioned upon defendant Kim paying \$1,937.50 for
22 plaintiff's expenses incurred in pursuing the motion for default
23 judgment. Plaintiff has not shown that reopening this litigation
24 would result in the requisite prejudice justifying an order requiring
25 this pro se defendant to pay plaintiff's expenses under the
26 circumstances presented here. See Nilsson, Robbins, Dalgarn,

1 Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1546
2 (9th Cir. 1988) (recognizing that in appropriate circumstances any
3 prejudice suffered by the non-defaulting party as a result of the
4 default and the subsequent reopening of the litigation can be
5 addressed by conditioning the setting aside of the default).

6 **CONCLUSION**

7 Accordingly, the court HEREBY RECOMMENDS that:

8 1. Defendant Kim's motion to set aside the entry of
9 default against her be granted;

10 2. Plaintiff's motion for entry of default judgment be
11 denied as moot; and

12 3. Defendant Kim be directed to file her answer within
13 twenty (20) days of the date of any order adopting these findings and
14 recommendation.

15 These findings and recommendations are submitted to the
16 United States District Judge assigned to the case pursuant to the
17 provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after
18 being served with these findings and recommendations, any party may
19 file written objections with the court and serve a copy on all
20 parties. Such a document should be captioned "Objections to Findings
21 and Recommendations." The parties are advised that failure to file
22 objections within the specified time may waive the right to appeal

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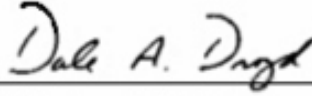
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the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 4, 2005.



DALE A. DROZ
UNITED STATES MAGISTRATE JUDGE

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